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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| JUAN HONG,<br>Plaintiff and Appellant,<br>v.<br>MICHAEL V. DRAKE et al.,<br>Defendants and Respondents. | G042565<br>(Super. Ct. No. 30-2008-00116145)<br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Peter J. Polos, Judge. Motion for sanctions. Order affirmed. Motion denied.

Juan Hong, in pro. per., for Plaintiff and Appellant.

Office of the General Counsel, Charles F. Robinson, Christopher M. Patti and Margaret L. Wu for Defendants and Respondents.

* * *

Plaintiff Juan Hong appeals from an order denying his motion to strike or tax costs, claiming the trial court erred in awarding costs to defendants The Regents of the University of California and Michael V. Drake, Chancellor. He asserts the memorandum of costs was defective because the verification language on the Judicial Council form does not exactly track the language in California Rules of Court, rule 3.1700(a)(1) (all further references to rules are to the California Rules of Court), which the Judicial Council also disseminated and that defendants are not entitled to recover their costs based on Government Code section 6103.5 (section 6103.5). We find no merit in his claims and affirm.

Plaintiff filed a motion for sanctions, arguing defendants included irrelevant material in the respondents' brief. We deny the motion.

## FACTS

Plaintiff sued defendants for an injunction requiring them to change the name of certain buildings and programs. After defendants demurred plaintiff filed an amended complaint that alleged the same facts and added several pages of citations. Defendants demurrered again, and the court's tentative ruling sustained it without leave to amend. The day before the hearing plaintiff filed a dismissal of the action without prejudice.

Defendants then filed a memorandum of costs, seeking $406.60, comprised of $390 for defendants' filing fees for the two demurrers, which included the first appearance fee, and $16.60 for copying exhibits. They used the Judicial Council form entitled "Memorandum of Costs (Summary)" (bold and capitalization omitted), which was designated as "[a]pproved for [o]ptional [u]se." Plaintiff filed a motion to tax or strike costs, arguing the verification on the cost memorandum was invalid and

defendants, as a public agency, could not recover its filing fees under section 6103.5 because no judgment had been entered. With their opposition to the motion defendants filed a proposed judgment of dismissal without prejudice and a revised memorandum of costs on which counsel struck through "and belief" on the form.

The court denied the motion, finding the verification was sufficient. It ruled that defendants were entitled to costs under Code of Civil Procedure sections 1032 and 1033.5, irrespective of section 6103.5. It also ordered the revised memorandum of costs be stricken.

## DISCUSSION

*1. Verification*

Plaintiff argues defendants' use of the verification on the memorandum of costs is invalid because it does not use the exact language set out in rule 3.1700(a)(1), which provides that a "memorandum of costs must be verified by a statement of the party[ or] attorney . . . that to *the best of his or her knowledge* the items of cost are correct and were necessarily incurred in the case." (Italics added.) The language on the optional form states, "To *the best of my knowledge and belief* this memorandum of costs is correct and these costs were necessarily incurred in this case." (Italics added.) Plaintiff contends the rule's use of the word "must" requires that the exact language be used and addition of the language "and belief" invalidates the verification. But plaintiff failed to provide any authority to support his premise and there is none.

First, nothing in rule 3.1700(a)(1) states that the verification language must be quoted exactly. Second, the optional form has been promulgated by the Judicial Council and is commonly used. (Rule 1.35(a) ["Forms approved by the Judicial Council for optional use, wherever applicable, may be used by parties and must be accepted for

filing by all courts"]; see also, e.g., *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1014 [award of fees requested by using optional form affirmed].) Therefore we must assume the Judicial Council believes the language on the form satisfies rule 3.1700(a)(1). It would make no sense at all to disallow costs based on use of a Judicial Council form where the verification language is slightly and inconsequentially different from the verification language in the Judicial Council rule.

Cases on which plaintiff relies, none of which come from California courts, do not support his position. Rather, they directly contradict it. For example, in *Skinner v. Aetna Life and Cas*. (D.C. Cir. 1986) 804 F.2d 148 the court determined knowledge and belief was not a "subjective understanding" as was "understanding and belief." (*Id*. at p. 151.) Rather, the term "refer[red] to knowledge as well as belief." (*Ibid*., italics omitted.) Likewise, in *United States v. Nektalov* (2d Cir. 2006) 461 F.3d 309, in discussing the principle of conscious avoidance in criminal cases, the court stated: "Contrary to Nektalov's contention that belief and knowledge are entirely discrete concepts, belief is more properly understood to be a part of knowledge." (*Id*. at p. 314, fn. omitted.) Further, knowledge and belief is not the equivalent of the lesser standard of "information or belief." By using "knowledge and belief" the signer is stating he or she knows the contents of the document. There is no support for plaintiff's claim the contents of the memorandum were hearsay.

Moreover, despite the language of rule 3.1700 case law allows substantial compliance with verification language. For example, in *Pacific Southwest Airlines v. Dowty-Rotol, Ltd*. (1983) 144 Cal.App.3d 491 the party seeking costs verified the memorandum of costs by stating the information in it was true. The court denied a motion to strike the memorandum, finding the verification "substantially met the requirement" under a prior statute that it state "the items claimed as costs are correct" "to the best of the declarant's knowledge and belief." (*Id*. at p. 495.)

The same sentiment is expressed in *Fischbach and Moore Intern. Corp. v. Christopher* (Fed.Cir. 1993) 987 F.2d 759 where, in rejecting a "hyper-technical argument," the court held verification of a claim to the best of the signer's "understanding and belief" substantially complied with the statutory requirement the verification be to the best of one's "knowledge and belief." (*Id.* at pp. 760, 762, 763.) Contrary to plaintiff's claim, use of the exact language is not "essential to promote the statutory design" (bold omitted) of the cost bill procedure.

Plaintiff relies on former Code of Civil Procedure section 1033, the statute that set out the language for verification of costs before enactment of rule 3.1700, that cost amounts were correct "to the best of [the signer's] knowledge and belief." He asserts common sense dictates there were "obvious reasons" why the Judicial Council changed the language in enacting rule 3.1700. But his bare claim there are obvious reasons does not explain the change or why the verification defense counsel signed does not suffice.

Although not raised in his motion to tax costs plaintiff now claims the memorandum of costs is defective also because the verification falsely states the costs were incurred and defendants did not actually incur filing fees under Government Code section 6103, which exempts public entities from paying such fees. Not so. As plaintiff himself quotes in another part of his brief, "Filing fees are . . . costs incurred but not paid . . . ." (*Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 164 [public entity defendants entitled to recover filing fees as costs].) Defendants' counsel did not make any false statements in executing the verification.

Moreover, there is no issue with the revised memorandum of costs because the trial court struck it. In short, the verification was sufficient and not a basis to strike the cost bill.

*2. Recovery of Filing Fees*

In a confusing and often circular argument, plaintiff contends defendants cannot recover costs. He concedes they are the prevailing parties. But, he asserts, the only statute that would authorize costs is section 6103.5, and it does not apply because no judgment was entered. He maintains the court erred in awarding costs to plaintiff under Code of Civil Procedure section 1032. We are not persuaded.

Section 6103.5, subdivision (a) provides that "[w]henever a judgment is recovered by a [denominated] public agency" defending against an action, for which "no fee for any official service rendered by the clerk of the court . . . has been paid, . . . the clerk entering the judgment shall include as a part of the judgment the amount of the filing fee . . . which would have been paid . . . ." The trial court determined this section did not apply because no judgment had been entered but ruled it did not bar recovery in such a case as here where plaintiff filed a voluntary dismissal.

Under Code of Civil Procedure section 1032, subdivision (b), "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." The court awarded defendants their costs under this section. Plaintiff asserts section 6103.5 expressly provides defendants are not entitled to costs. He makes a conclusory claim that it is a more specific provision that should "override" the general terms of Code of Civil Procedure section 1032. But he provides no applicable authority or meaningful authority to support this claim. His examples of other statutes he claims are also exceptions to section 1032 (Civil Code section 1717; Code of Civil Procedure section 998; the California Public Records Act (Gov. Code, § 6250 et seq.); the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.)) are inapt and unpersuasive.

There is authority contradicting plaintiff's assertion. *Guillemin v. Stein*, *supra*, 104 Cal.App.4th 156 unequivocally states that public agencies' "[f]iling fees, . . .

incurred but not paid, . . . are recoverable under the general costs statute" (*id*. at p. 164), i.e., Code of Civil Procedure section 1032. The court went on to state that because "section 6103.5 specifically prescribes the inclusion of these fees as costs in a judgment[,] . . . a trial court does not have any discretion to tax them." (*Ibid*., italics omitted.) Thus *Guillemin* clearly suggests that Code of Civil Procedure section 1032 mandates an award of costs where section 6103.5 is inapplicable due to lack of a judgment. And, as both parties agree, the point of section 6103.5 is to award costs to public agencies that are "successful defendants." (*Guillemin v. Stein*, *supra*, 104 Cal.App.4th at p. 166, italics omitted.) Such is the case here.

Plaintiff criticizes the trial court's reliance on *Guillemin* and unsuccessfully attempts to distinguish it. That the facts and procedural history were different does not diminish the applicability of the legal principles. And it makes no difference that the dismissal was without prejudice. Even assuming plaintiff has the right to refile this action, defendants still incurred costs in this case in which they prevailed.

Using a different argument, plaintiff seems to be under the impression that upon presentation of his dismissal without prejudice the court would not have filed it without first demanding he pay costs. He relies on Code of Civil Procedure section 581, subdivision (b)(1), which allows dismissal with or without prejudice before trial begins, "upon payment of the costs, if any." He then makes the tautological argument that he was not required to pay costs and thus his "dismissal was approved without imposition of payment of the costs." But that is not how the process works. Filing a dismissal is merely a ministerial duty. (*S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 380.) Determination of liability for costs is subsequently decided upon presentation of a cost bill, as was done here. And even though the case was dismissed the court retains jurisdiction to rule on a motion to tax costs and order payment. (*Frank Annino & Sons*

*Construction, Inc. v. McArthur Restaurants, Inc.* (1989) 215 Cal.App.3d 353, 357.) The clerk's filing of the dismissal did not estop the court from awarding costs.

*3. Motion for Sanctions*

In their respondents' brief defendants described several other cases in which plaintiff has sued The Regents and its employees. They argue that the appeal arises from one in "eight baseless lawsuits" plaintiff filed against the University of California, and its employees and attorneys. Defendants also set out a two and a half page statement of facts in addition to the list of other cases.

Relying on rule 8.276(a)(2), plaintiff argues we should impose sanctions because this information is "not reasonably material to the appeal's determination." He seeks $3,000 for himself, calculated at $300 per hour for 10 hours of time, and $2,000 to be paid to the court "for the cost of processing [his] motion]."

The motion is not well taken. Rule 8.276(a)(2) prohibits including irrelevant matter in the appellate record, not the brief. Further, plaintiff has not cited any authority for an award of sanctions to a pro. per. lawyer. (See *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1180 [denial of attorney fees discovery sanctions to pro. per. counsel; "[n]o sanctions case has approved an award based on reasonable expenses for the time and effort expended by a pro se litigant"; see also *Musaelian v. Adams* (2009) 45 Cal.4th 512, 517 [pro. per. lawyer not entitled to attorney fees sanctions under Code Civ. Proc., § 128.7].) Finally, we would not have had to spend any time "processing" this motion that borders on the frivolous had plaintiff not filed it.

## DISPOSITION

The order is affirmed. The motion for sanctions is denied. Respondents are entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.